Supreme Court, U.S.
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92-1352

No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

HAROLD A. PETERSON; MARY J. PETERSON,
Petitioners

v.

SOO LINE RAILROAD COMPANY;
DCA HEALTHCARE MANAGEMENT GROUP, INC.,
Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether or not the Petersons, neither of whom are plan participants or beneficiaries of any plan of the Respondents, are by ERISA precluded their common law state causes of action for damages.

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OPINIONS BELOW

The Ninth Circuit Court of Appeals stated that disposition of the case was not appropriate for publication and it has not been published. The Ninth Circuit Court of Appeals opinion is included as Appendix A. The District Court opinion is included as Appendix B.

JURISDICTION

1. The Judgment in the Ninth Circuit Court of Appeals was entered on 15 October 1992 and is included here as Appendix C.

2. The Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

3. Pursuant to Supreme Court Rule 10(c) the question of whether persons who are not beneficiaries and are not plan participants have all common law rights pre-empted by ERISA is an important question of Federal law which has not been but should be settled by the Supreme Court. To decide the question as the Court of Appeals decided denies the Petitioners due process and equal protection of the laws as guaranteed by the United States Constitution.

STATEMENT OF THE CASE

A. Statement of Jurisdiction in the Ninth Circuit Court of Appeals

This case was originally filed in the Montana State District Court and was removed by the Respondent Soo Line Railroad to the United States District Court. It was removed pursuant to 29 U.S.C. § 1000 *et seq.* ERISA and pursuant to 28 U.S.C. § 1446(b), 28 U.S.C. § 1332, diversity of citizenship and the amount in controversy exceeding Fifty Thousand Dollars ($50,000.00).

The Magistrate Judge entered a final Judgment against the Petitioners pursuant to F.R.C.P. Rule 54. The Court of Appeals had jurisdiction under 28 U.S.C. § 636(c)(3).

B. Statement of the Case and Facts

Harold A. Peterson and his wife, Mary J. Peterson, (hereinafter Petersons) were sued by Excelsior Youth Center of Colorado for the cost of treatment and care of Mary Peterson and Joseph V. Salo's daughter, Mary Heather Salo (hereinafter Heather). The Colorado Court entered Judgment. The Petersons were then sued in Montana based on the Colorado Judgment. Petersons filed an action in the Montana State Court against Soo Line Railroad Company (hereinafter Soo Line) and DCA Healthcare Management Group, Inc. (hereinafter DCA). The

case was then removed to the Federal Court. Motion to Dismiss based on preemption by ERISA was filed and denied. Soo Line and DCA then changed attorneys. Extensive discovery was undertaken and completed and on 4 March 1991 Soo Line filed a Motion for Summary Judgment. Summary Judgment was granted on the basis that ERISA pre-empted the Petersons' common law state claims.

Petersons are neither plan participants nor plan beneficiaries (found by the Magistrate Judge and conceded by all parties). Mary Peterson was married to Joseph Salo. He was an employee of Soo Line's predecessor, Chicago Milwaukee, St. Paul, Pacific Railroad Company. He had been an active employee through 15 March 1979. In March 1979 he had a sudden and severe onset of multiple sclerosis. He continued to have certain benefits with Soo Line Railroad as did his dependent children. Over the years the children received medical care payments from Soo Line, although Soo Line maintained there was no plan or benefits available to the children after March 1980. Heather was admitted to Deaconess Hospital in Billings, Montana in April 1986. She was Sixteen (16) at the time and was having emotional mental problems. She was in Deaconess Hospital until 20 July 1986 when she transferred to Excelsior in Colorado.

Before placing her in Excelsior Petersons made inquiry of DCA as to whether Heather would be covered. Others also made inquiries. Dr. William Hague, who was Heather's treating physician and Excelsior personnel made inquiries of DCA as to whether there was coverage available for Heather's stay at Excelsior. Assurances were given. Based on those assurances Harold Peterson, who had no responsibility whatsoever for Heather's care, and Mary Peterson entered into a contractually binding responsibility for payment for her care. This was done based on historic experience in dealing with Soo Line

relative to Joseph Salo's children and the representations that were made. She would not have been placed there but for the assurances that were given. Heather's care at Deaconess Hospital in Billings, Montana was paid but when it came time to pay for the care of Excelsior, everyone was notified that there was no Plan and no coverage and there had not been since 1980. The Petersons are not educated individuals and are of very limited means. They were unable to pay anything for Heather.

REASONS FOR GRANTING THE WRIT

Soo Line and DCA have maintained that Joseph Salo's dependents (Heather) had no rights under any plan after March 1980. There was no plan. The lawsuit filed by the Petersons was not a suit to obtain a benefit for Heather Salo. It is a suit for contract implied in law, negligent misrepresentations and constructive fraud under the laws of the State of Montana. The legal basis arose because Soo Line continued to pay for the health care of the Salo children after March of 1980 after the plan ceased to exist and then making representations that there was coverage available which representations induced the Petersons to sign and become obligated under contracts with Excelsior Youth Center in Colorado.

By definition under ERISA Petersons are not participants or beneficiaries. Those terms are defined in 29 U.S.C. § 1002(7)(8) as follows:

> (7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.
>
> (8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee

benefit plan, who is or may become entitled to a benefit thereunder.

Under 29 U.S.C. § 1132(a) the only person empowered to bring a civil action for civil enforcement is a participant or beneficiary.

All of the cases prior to this case have found preemption only where the persons are governmental authorities, employees, participants, or beneficiaries. In *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983) this Court held that the New York Human Rights Law is preempted with respect to ERISA benefit plans only insofar as it prohibits practices that are unlawful under Federal Law.

Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987) is a case that involved certain claims by an employee, participant. Employee, participants clearly have a cause of action under the ERISA, and they are limited to the remedies and rights under that law. *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987) also involved an employee making certain claims under an ERISA regulated welfare benefit plan. Clearly that employee, participant had rights under ERISA to bring an action in the Federal District Court and was limited by the act. In *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990), this Court again considered the question of whether an employee who was unlawfully discharged had his common law claim of unlawful discharge preempted by ERISA. This Court concluded that it was.

All of the foregoing United States Supreme Court cases do not involve any claim by a person who was clearly not a participant or not a beneficiary of the alleged plan.

Quoting extensively from *Shaw v. Delta Airlines*, *supra*, The United States Court of Appeals for the Second

Circuit in *Howard v. Gleason*, 901 F.2d 1154 (2nd Cir. 1990) stated as follows:

> This appeal raises the frequently litigated issue of the scope of federal preemption under ERISA, the comprehensive federal statutory scheme "designed to promote the interests of employees and their beneficiaries in employee benefit plans, *Shaw v. Delta Air Lines, Inc.* 463 U.S. 85, 90 (1983)
>
> * * *
>
> But courts have reasonably concluded, notwithstanding the sweeping effect intended for ERISA preemption, that not every state law that affects ERISA plans is preempted. Some state laws simply affect employee benefit plans in "too tenuous, remote or peripheral a manner to warrant a finding that the law relates to the plan *Shaw v. Delta Air Lines, Inc.* 463 U.S. at 100 n.21

Before its decision in this case, the Ninth Circuit Court of Appeals seemed to be in accord with the Second Circuit. The Ninth Circuit in *Martori Bros Distributors v. Jyrl James-Massengale*, 781 F.2d 1346 (9th Cir. 1986) after referring to the statute states as follows:

> 29 U.S.C. § 1144(a) states that ERISA shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan.
>
> * * *
>
> . . . that while the scope of section 5144(a) is broad, it is not all-encompassing, Scott, 754 F.2d at 1504; Lane, 743 F.2d at 1340. As the Supreme Court noted, some state actions may affect employee benefit plans in too tenuous, remote or peripheral a manner to warrant a finding that the law relates to the plan, *Shaw*, 463 U.S. at 100 n.21. Furthermore, [w]e must also presume that [in enacting ERISA] Congress did not intend to preempt areas of traditional state regulation, *Metropolitan Life Insurance Co. v. Massachusetts*, 105 S.Ct. 2380, 2389 (1985).

> The state laws that have been found to be preempted by section 514(a) because they "relate" to ERISA plans fall into four categories. First, laws that regulate the type of benefits or terms of ERISA plans. Second, laws that create reporting, disclosure, funding, or vesting requirements for ERISA plans. Third, laws that provide rules for the calculation of the amount of benefits to be paid under ERISA plans. Fourth, laws and common-law rules that provide remedies for misconduct growing out of the administration of the ERISA plan.

The Petersons in this case do not fall within any of those categories. The closest category to which they come is the Fourth Category. However, in this case there is no claim that there was any misconduct in the administration of the ERISA plan. There were commitments made and medical claims paid for Joseph V. Salo's dependents. There were representations made to the Petersons. There are implied contracts which arise by Soo Line and DCA's actions and torts committed which led Petersons to change their position to their detriment in reliance. Petersons obligated themselves to pay a monthly payment for a child in an amount which exceeded their monthly income by about One Thousand Dollars ($1,000.00). In *Perry v. P*I*E Nationwide, Inc.*, 872 F.2d 157 (6th Cir. 1989) it was found that common-law actions of fraud or misrepresentation are not preempted by ERISA. In support of its decision it cited two cases from the Ninth Circuit and stated in relevant part as follows:

> After discussing *Scott v. Gulf Oil Corp.*, 754 F.2d 1499 (9th Cir. 1985), the district court cited it as "finding that if an individual is neither a participant nor beneficiary then he does not fall within the sphere of ERISA." Because the purported misconduct of P*I*E occurred before plaintiffs became participants or beneficiaries, and because they were not suing for benefits under the plan, the district court held that

> preemption did not apply. Scott concerned the employees' loss of severance and "prospective" benefits after Gulf sold the refinery to another company which agreed to continue the employment of former Gulf Oil employees. "The conduct giving rise to the claim was the negotiation of an employment contract which prevented the existence of an employee benefit plan." The Scott court held that the plaintiffs' state law claims were not preempted because they did "not raise any issues concerning the matters regulated by ERISA." "The issues raised by the claim," stated the court, "are not different than those that would be raised by a claim that Gulf had conspired with, [the buyer] to accept . . . lower wages, claim that would clearly not be preempted by ERISA." The court also indicated that the plaintiffs' claim for prospective benefits was closely analogous to the claim in *Freeman v. Jacques Orthopaedic & Joint Implant Surgery Medical Group, Inc.*, 721 F.2d 654 (9th Cir. 1983), in which an employee brought an action alleging that his employer fraudulently induced him to waive his right to participate in a pension plan.

The Sixth Circuit Court of Appeals citing the case of *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1209 (8th Cir.), *cert. denied*, 454 U.S. 968, 70 L.Ed.2d 384, 102 S.Ct. 512 (1981) held:

> *that preemption should apply to a state law claim only if Congress has provided a remedy for the wrong or wrongs asserted.* (Emphasis added)

In this particular case as the Magistrate Judge pointed out, there is no remedy for the Petersons if their cause of action is preempted by ERISA. In this particular case there were representations made, there are implied contracts which arise by Soo Line and DCA's actions and torts committed which lead Petersons to change their position to their detriment in reliance upon statements and representations. Petersons cannot be left without a remedy. The suggestion that they may be left without a

remedy violates the ancient revered maxim, *ubi jus, ibi remedium* (where there is a right, there is a remedy), *Missouri-Kansas-Texas R. Co. et al. v. Randolph et al.*, 183 F.2d 996 (8th Cir.1950), *Rekant v. Desser*, 425 F.2d 872 (5th Cir. 1970). It has been suggested that:

> There are two fundamentals of the common law, which are essentials of that due process of law which is guaranteed by the Constitution. Where there is a right there is a remedy, *Ashby v. White, 1 Salkeld, 19 . . . Metropolitan Railway Receivership*, 208 U.S. 90, 50 L.Ed. 403, 28 S.Ct. 219 (1907)

The United States Supreme Court has consistently followed some variation of the maxim, *Rawson v. Sears Roebuck & Co.*, 822 F.2d 908 (10th Cir. 1987).

Further, any relation to the ERISA plan maintained by Soo Line is *TOO TENUOUS, REMOTE OR PERIPHERAL* to find that the claims relate to the plan. Indeed Soo Line maintains there was no plan. In the case of *Sorosky v. Bowles*, 326 F.2d 794 (9th Cir. 1987) the Ninth Circuit Court of Appeals found that even though Sorosky was an employee that certain of his state law claims for breach of contract were not preempted by the ERISA preemption clause.

The claims of the Petersons clearly sound in tort or implied contract. Their common law state causes of action are no different than any other contracts or torts committed by Soo Line of DCA. The fact that they committed the torts or created an implied contract with respect to a nonexistent plan is at best a tenuous, remote or peripheral reference to a plan.

To deny the Petersons is to deny them due process and equal protection of the laws as guaranteed by the United States Constitution.

CONCLUSION

For all of the reasons set forth above, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-35659

D.C. No. CV-89-00112-RWA

HAROLD A. PETERSON; MARY J. PETERSON,
Plaintiffs-Appellants,

v.

SOO LINE RAILROAD COMPANY;
DCA HEALTH CARE MANAGEMENT GROUP, INC.,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Montana
Richard W. Anderson, Magistrate Judge, Presiding

Argued and Submitted October 9, 1992
San Francisco, California

MEMORANDUM*

[Filed Oct. 15, 1992]

Before: BROWNING, THOMPSON and KLEINFELD, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

OVERVIEW

In this diversity action, Harold A. Peterson and Mary J. Peterson ("the Petersons") appeal the district court's summary judgment holding that their state law claims were preempted by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq. (1985) ("ERISA"). The Petersons further contend that they were improperly denied an opportunity to amend their complaint to add additional state law claims. We have jurisdiction under 28 U.S.C. § 1291 (1966), and we affirm.

DISCUSSION

Summary judgment is "appropriate only when no genuine issue of material fact exists and the moving party is clearly entitled to prevail as a matter of law." *Green v. Los Angeles County Superintendent of Schools*, 83 F.2d 1472, 1475 (9th Cir. 1989). Within the context of this case, if ERISA preempts the Petersons' state law claims, then the defendants are entitled to summary judgment.

" '[T]he question whether a certain state action is preempted by federal law is one of congressional intent.' " *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987) (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985)). ERISA's preemption provision is "deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.' " *Pilot Life*, 481 U.S. at 46 (citation omitted). Moreover, it has recently been described by the Supreme Court as "conspicuous for its breadth." *FMC Corp. v. Holliday*, 498 U.S. ——, ——, 111 S. Ct. 403, 407 (1990). It provides for federal preemption of "any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan described in section 1003(a) . . . ." 29 U.S.C. § 1144(a) (1985) (emphasis added). The question on which this appeal turns, then, is whether the Petersons' state law claims "relate to" Soo Line Railroad Company's ("Soo Line") employee health care plan.

The Petersons argue that they are claiming damages which they suffered because they relied on statements made by representatives of DCA Health Care Management Group ("DCA"), rather than benefits due under Soo Line's employee benefit plan. As a consequence, they contend their claim does not relate to Soo Line's plan and is not preempted by ERISA. We understand this argument, but we reject it.

State law claims which "arise from the administration of [an ERISA governed] plan[] . . ." are preempted. *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1504 (9th Cir. 1985); *see also Greany v. Western Farm Bureau Life Ins. Co.*, 1992 U.S. App. LEXIS 20462 (9th Cir.). In determining whether a claim is preempted, it is necessary to decide whether "the conduct challenged . . . was part of the administration of an employee benefit plan." *Scott*, 754 F.2d at 1505.

In *Greany*, the plaintiff had left the defendant's employ on July 31, 1983, believing his family was covered by the defendant's group health plan until August 31, 1983. In fact, the coverage terminated August 1, 1983. There was, however, at least one notice from the insurer to the plaintiffs stating that coverage terminated August 31, 1983. Unfortunately, the plaintiff's wife gave birth prematurely in the interim, to a baby that needed extensive medical care. When the insurer refused coverage, the plaintiff brought suit asserting several common law causes of action.

In analyzing the case, we noted that despite attempts by the plaintiff to recharacterize the relationship between the parties, "[i]n reality, the Greanys challenge[d] the administration of ERISA plan benefits, . . ." *Greany v. Western Farm Bureau Life Ins. Co.*, 1992 U.S. App. LEXIS 20462. We said this was so because the employer's conduct "was merely a continuation of the duties it has as an employer in providing the group plan." *Id.* As a result, the state claims were preempted by ERISA.

Similarly, in this case, the conduct challenged was part of the administration of an ERISA plan. DCA's repre- have relied on, were made, if at all, while administering Soo Line's employee benefit plan. Soo Line had hired DCA to administer its plan, and that is how the Petersons came into contact with DCA. Mary Peterson did not call DCA at random to request assistance with Heather's medical bills. She called it to ask about coverage because she thought that Heather was a beneficiary under Soo Line's plan. DCA's answers to Mary Peterson's inquiries, regardless of their substance, were thus provided in furtherance of its duty to administer the plan. As a result, as in *Greany*, any causes of action which arise from DCA's answers, as the Petersons' claims surely did, necessarily relate to the ERISA-governed plan and are therefore preempted by ERISA.

Moreover, where the existence of an ERISA-governed plan is a "critical factor" in establishing a state law claim, ERISA preempts it. *Ingersoll-Rand Co. v. McClendon*, —— U.S. ——, ——, 111 S. Ct. 478, 483 (1990). In *Ingersoll*, the plaintiffs had filed a state law wrongful discharge claim alleging that their employer fired them to avoid paying benefits which would otherwise have become due. The Court held that, as the benefit plan's existence was a critical factor in their claim, the claim related to the plan and ERISA preempted it.

In the present case, the relation between the state law claims and the benefit plan is even closer. Here, the gravamen of the Peterson's state law claims is that they relied on DCA's statements and suffered damages as a result. Even if DCA made the statements alleged, the Petersons' cause of action requires the existence of a plan because it requires their reliance to have been reasonable. *See Trad Industries, Ltd. v. Brogan*, 246 Mont. 439, 446 (1991) (dicta); *Keil v. Glacier Park, Inc.*, 188 Mont. 455, 462 (1980) (dicta); *see also* Restatement of Contracts § 90 (1932). If the Petersons did not believe Heather was covered by the plan, no reliance on DCA's promises

to pay for her health care could possibly have been reasonable. Consequently, as in *Ingersoll*, "the existence of a . . . plan is a critical factor in establishing liability under the State [claims]" and the state claims are thus preempted.

Despite the relationship discussed between the Petersons' state law claims and the Soo Line benefit plan, the Petersons argue that neither of them is either a participant in or a beneficiary of the Soo Line plan as defined by 29 U.S.C. § 1002(7), (8) (1985). They contend that as a result, if they are denied their state law claims they will be left with no remedy. Thus, they argue, their state law claims cannot be preempted.

In the first instance, it may be that if benefits were due to Heather, she had a cause of action under ERISA. The Petersons' argument, however, must be rejected for an even more fundamental reason. As this court has previously held, "[t]here is simply no reason to assume that Congress intended ERISA's preemption reach to be coextensive with the Act's civil remedial scheme." *Olson v. General Dynamics Corp.*, 591 F.2d 1123 (9th Cir. 1991); *see also Porcaro v. The Colonial Life Insurance Co. of America*, 1991 U.S. Dist. LEXIS 15800 (W.D. Va.). Preemption of a party's common law remedy is not dependent on the existence of an ERISA remedy.

Finally, the Petersons contend they should have been allowed to amend their complaint and that the district court improperly denied their motion to do so. We disagree. Based on the foregoing analysis, any additional state law claims for benefits which were denied under the plan, or for damages because the benefits were denied, would be preempted by ERISA. As a result, the Petersons' proposed amendment would be futile. Futility being a proper ground for refusing to allow an amendment, *Hurry Up Retirement Fund Trust*, 648 F.2d 1252 (9th Cir. 1981), the district court's denial of the motion to amend was proper.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

Cause No. CV 89-112-BLG-RWA

HAROLD A. PETERSON and MARY J. PETERSON,
Plaintiffs,

vs.

SOO LINE RAILROAD COMPANY and
DCA HEALTHCARE MANAGEMENT GROUP, INC.,
Defendants.

MEMORANDUM AND ORDER

[Filed May 8, 1991]

Presently pending before the Court are defendants' motions for summary judgment filed pursuant to Rule 56, Fed.R.Civ.P., regarding a controversy arising from health care benefits under an employee benefit plan, defendants' motions to exclude the expert testimony of Walter R. Fairfax, M.D., and James Brooks, as well as plaintiffs' motion to amend their complaint in order to add the theory of negligence. Having considered the briefs filed on the matter, the documentation in support thereof, the arguments advanced by the respective parties in open court May 1, 1991, and for the reasons advanced below, the Court grants defendants' motions for summary judgment, deems defendants' motions to exclude witnesses as moot and denies plaintiffs' motion to amend the complaint.

I.

BACKGROUND

Joseph V. Salo, former spouse of plaintiff Mary J. Peterson, was employed by Milwaukee railroad from 1954 until 1979, when he left employment due to disability. During his employment and at the time of his disability, Mr. Salo and his dependents, to include Heather Salo, were covered by the Milwaukee's health care program. Coverage extended until Mr. Salo became eligible for Medicare which occurred in March of 1980.

In 1985, Milwaukee was purchased and absorbed by Soo Line Railroad Company which assumed certain employee benefits including the health care program at issue. As a self-insurer, Soo Line contracted out to DCA Healthcare Management Group, Inc., to handle and administer claims under the Soo Line plan.

While Mr. Salo's coverage eligibility under the Milwaukee plan was to have ceased in 1980, he had been, mistakenly, carried over under the Soo Line plan. The mistake was discovered in June of 1986, and Soo Line informed DCA that Mr. Salo's benefits were thereby terminated. The Petersons were not informed of the termination of benefits at that time.

Mr. Salo's daughter, Heather, had developed mental problems requiring special treatment. Mary and Harold Peterson, Heather's mother and step-father, signed an Agreement for Private Placement of Heather with the Excelsior Youth Center, Inc., in Aurora, Colorado. Excelsior is a residential care facility. The agreement provided:

> The Parent/DCA Health Care Management shall pay Excelsior monthly payments of Two Thousand Six Hundred and Seventy-Four Dollars ($2,674.00) on or before the 15th of the month following the month in which services were provided.

The Petersons also signed an Enrollment Agreement which provided:

> The parent, guardian and/or agent signatory hereto agrees to pay fees as contracted for per month for the services provided by Excelsior, . . .

Prior to the placement, plaintiffs allege that they contacted DCA and were assured that treatment of Heather, as Mr. Salo's dependent, would be covered under his employment health care program. In Mary Peterson's deposition, she testified that she understood that by signing the agreement, she would be held personally liable for payment to Excelsior should the plan not pay.

Heather was placed in Excelsior in July of 1986 through 1987. The cost of her treatment was $26,257.32. The plan did not pay the cost of treatment, and a judgment was eventually entered in favor of Excelsior and against plaintiffs for the principal sum, interest and costs totaling $33,856.20.

On May 24, 1989, plaintiffs filed a complaint against the above-named defendants, as the self-insurers and administrators of the plan, which the District Court for the Thirteenth Judicial District, Yellowstone County, under various alternative theories to include breach of contract, both express and implied, promissory estoppel, laches and breach of the implied covenant of good faith and fair dealing. The case was removed.

The defendants filed separate motions for dismissal of the complaint under Rule 12(b)(6), Fed.R.Civ.P., asserting that, since the action comes within the purview of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. Section 1001, et seq., plaintiffs failed to exhaust their remedies under ERISA, plaintiffs lacked standing to sue under ERISA and plaintiffs' state law claims were preempted under ERISA.

The Court issued its memorandum and order on February 23, 1990. Because plaintiffs conceded that they

lacked standing to sue under ERISA since they were not beneficiaries or participants in the health care plan, see 29 U.S.C. § 1132(a)(1), this Court deemed the exhaustion of remedies argument raised by defendants moot. It was noted that plaintiffs were asserting their action under Montana law based upon representations made independent of the plan in question. This Court denied the motion to dismiss and stated:

> Whether plaintiffs are able to factually establish the existence of an implied contract and breach thereof, without reference to or reliance upon the existence of the health care program, are issues which properly await resolution at a later stage of these proceedings.

Defendants now move this Court for summary judgment based primarily upon the assertion that plaintiffs' claims are preempted under (ERISA), 29 U.S.C. § 1001, et. seq. Plaintiffs oppose the motion and argue that their claims are based upon certain representations which are sufficiently unrelated to the benefit plan and, thus, were insulated from the preemptive effect of ERISA.

II.

DISCUSSION

Rule 56(c), Fed.R.Civ.P., provides that summary judgment is appropriate if the pleadings and other documentation "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Also, *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). As provided in *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), the moving party has the initial burden to identify portions of the record which it believes would establish an absence of a material fact. Once accomplished, the burden shifts to the party opposing the motion to "set forth specific facts showing that there is a genuine issue for trial." *Kaiser*

Cement Corp. v. Fischbach & Moore, Inc., 793 F.2d 1100, 1103-04 (9th Cir.), cert. denied, 479 U.S. 949 (1986). Should reasonable doubt exist as to genuine issues of material fact, such must be resolved against the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). A material fact has been defined as:

> [O]ne that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. The materiality of a fact is thus determined by the substantive law governing the claim or the defense.

T.W. Electrical Services, 809 F.2d at 630 (citations omitted).

As noted by plaintiffs in their motion to amend the complaint, the facts in this case have been fully developed. The disputed facts are those regarding alleged representations made to plaintiffs regarding coverage for Heather's care at Excelsior. Even assuming arguendo that such representations were made to plaintiffs, their claims must fail under the applicable law.

ERISA provides that its sections, "shall supersede any and all State laws insofar as they may now or hereinafter *relate to any employee benefit plan.*" (Emphasis supplied.) 29 U.S.C. § 1144(a). State law is defined under the Act as "all laws, decisions, rules, regulations or other State action having the effect of law, of any State." 29 U.S.C. § 1144(c)(1).

While this preemptive provision is to be broadly construed, *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522-25 (1981), the Court notes that it is not all-encompassing. *Martori Bros. Distributors v. James-Massengale*, 781 F.2d 1349, 1356 (9th Cir.), cert. denied, 479 U.S. 949, 1018, modified, 791 F.2d 799 (1986); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). "A law 'relates to' an employee benefit plan, in

the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983).

ERISA preempts state remedies which either directly or indirectly relate to an employee benefit plan, *see Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1215 (8th Cir.), cert. denied, 454 U.S. 1084 (1981), so long as the relationship is not "too tenuous, remote or peripheral." *Shaw*, 463 U.S. at 100 n. 21. Preemption is appropriate where the state claims raised involve benefits relating to past employment. *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1505-06 (9th Cir. 1985). *See, also, Settles v. Golden Rule Life Ins. Co.*, 927 F.2d 505 (10th Cir. 1991). Only where the state claims have no such relationship will preemption be deemed inappropriate. *Sorosky v. Burroughs Corp.*, 826 F.2d 794, 800 (9th Cir. 1987).

Here, the record is replete with references to and reliance upon the plan at issue. The complaint itself states that defendants were contractually obligated to pay for the health care of Heather at Excelsior upon several theories to include:

> A. That there was an *express health care contract* which provided for benefits for Mary Heather Salo.
>
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> G. There is a contract arising by reason of long term course of action wherein the Defendant Railroad has provided health care payments for the children of Joseph V. Salo without question until July 1987.
>
> . . .

(Emphasis supplied).

Correspondence, dated September 8, 1988, directed from plaintiffs' counsel to the manager of the Benefits Administration for Soo Line stated:

> The program at Milwaukee Road at the time Joe Salo became disabled was that he would continue to be covered for medical expenses and his dependents would continue to be covered . . .

Also, correspondence, dated August 12, 1987, directed from plaintiffs' counsel to the same stated:

> Our firm has been retained by Mary Salo Peterson with respect to the medical group coverage for her family which was issued under her previous husband, Joseph V. Salo.

Further, plaintiffs, in their brief, set forth the following:

> Certainly the existence of a medical plan and the course of conduct of the Defendants are part of the facts which establish reliance on and form a portion of the factual representations made to the Plaintiffs.

From these references to the health care plan, as well as the facts of the case presented by the parties, the Court can make no other finding than that plaintiffs relied on the benefit provisions of the plan as it related to the medical care received by Heather Salo. The finding is made notwithstanding any other alleged representation that plaintiffs may have relied upon in asserting their common law claims.

Having established that plaintiffs did indeed rely upon and relate to the health care plan at issue in asserting their claims, the Court's attention then turns to the legal effects of reliance on the claims asserted in regard to preemption. The Ninth Circuit has held that ERISA preempts various common law theories to include those of contract implied in fact, breach of contract, fraud, promissory estoppel, estoppel by conduct and deceit. *Blau v. Del Monte Corp.*, 748 1348, 1356-57 (9th Cir. 1984).

In fact, state laws which authorize causes of action for the improper handling of claims under a benefit plan have been held to be directly connected with the employee benefit plan, and, thus, subject to the preemptive ambit of ERISA. *Russell v. Massachusetts Mut. Life Ins. Co.*, 722 F.2d 482, 487-88 (9th Cir. 1983). *See, also, Lea v. Republic Airlines, Inc.*, 903 F.2d 624, 632 (9th Cir. 1990).

While the Court is cognizant of the fact that plaintiffs' claims lie within the statutory provisions of ERISA and that, since they are neither plan participants nor plan beneficiaries, they have no standing to bring a grievance under the Act, plaintiffs' claims, including their claim for negligent misrepresentation proposed in their motion for amendment of the complaint, must fail as preempted under ERISA. The amended claims most certainly relate to Mr. Salo's employee benefit plan and are centered around Heather Salo's coverage as a beneficiary thereunder. The misrepresentations, if any, relate to the plan.

The Court notes that the ruling is harsh and leaves plaintiffs without a remedy. However, it has no choice but to rule in accord with the expansive sweep of the preemption effect of ERISA as intended by Congress and as interpreted and upheld by the Ninth Circuit Court of Appeals and the United States Supreme Court.

Accordingly, IT IS ORDERED:

1. Defendants' motions for summary judgment are granted.

2. Plaintiffs' motion to amend the complaint is denied.

3. Defendants' motions to exclude expert testimony are deemed moot by the ruling in the case.

DONE AND DATED this 8th day of May, 1991.

/s/ Richard W. Anderson
United States Magistrate Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-35659
CT/AG#: CV-89-00112-RWA

HAROLD A. PETERSON; MARY J. PETERSON,
Plaintiffs-Appellants
v.

SOO LINE RAILROAD COMPANY;
DCA HEALTHCARE MANAGEMENT GROUP, INC.,
Defendants-Appellees

Appeal from the United States District Court
for the District of Montana (Billings)

JUDGMENT

[Filed Nov. 13, 1992]

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Montana (Billings) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered: 10/15/92

Supreme Court, U.S.
FILED
FEB 23 1993
OFFICE OF THE CLERK

No. 92-1352

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

HAROLD A. PETERSON; MARY J. PETERSON,
Petitioners,

v.

SOO LINE RAILROAD COMPANY;
DCA HEALTHCARE MANAGEMENT GROUP, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENT DCA HEALTHCARE'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

The restated question presented for review is as follows: Did the Ninth Circuit Court of Appeals correctly rule that Petitioners Petersons' state law claims were preempted under federal law because such claims referenced and were related to a healthcare program or plan governed by the provisions of the Employee Retirement Income Security Act (ERISA).

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENT DCA HEALTHCARE'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Ninth Circuit Court of Appeals stated that disposition of the case was not appropriate for publication and it has not been published.

JURISDICTION

1. The Judgement in the Ninth Circuit Court of Appeals was entered on 15 October, 1992.

2. The Supreme Court has jurisdiction to consider a Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Statement of jurisdiction in the Ninth Circuit Court of Appeals.

Respondent DCA Healthcare Management Group, Inc., (hereinafter referred to as "DCA") agrees with Petitioners' statement of jurisdiction in the Ninth Circuit Court of Appeals as set forth on page 3 of their Petition.

B. Statement of the case and facts.

Joseph V. Salo was employed by the Milwaukee Railroad from 1954 until 1979 when he left employment due to severe health problems and disability. During his employment with Milwaukee Railroad and at the time of his disability, Mr. Salo and his dependents were covered by Milwaukee's health care program. At that time, his dependents included a child, Heather Salo, and his former wife, now Petitioner Mary J. Peterson. Even though no longer employed by Milwaukee Railroad, Mr. Salo's health care program extended coverage to himself and to his dependents until he became eligible for Medicare.

The Milwaukee Railroad was purchased and absorbed by Soo Line Railroad Company (hereinafter "Soo Line") in 1985. At that time, Soo Line assumed certain employee benefits including the health care program which provided benefits for Mr. Salo's children, including Heather Solo. Soo Line contracted to DCA the contract to handle and administer all health claims under the Soo Line plan.

Even though Mr. Salo's coverage under the Milwaukee Plan was to have ceased at the time he became eligible for Medicare (which occurred in March of 1980); Mr. Salo had been, mistakenly, named on and carried over for benefits under the Soo Line health plan. In June of 1986 the mistake was discovered and Soo Line informed DCA that Mr. Salo's benefits were thereby terminated.

To digress, on April 22, 1986, Heather Salo was admitted to the Deaconess Medical Center in Billings, Montana, for treatment of emotional and mental problems. She remained in the hospital until July 20, 1986, and during her hospitalization her mother, Petitioner Mary J. Peterson and her stepfather, Petitioner Harold A. Peterson, began looking for a long-term placement facility for Heather.

On May 29, 1986, Mary Peterson made a telephone call to the offices of DCA, who was still the plan supervisor for the Soo Line "self funded" employee medical benefit plan. Essentially she asked whether or not an in-patient mental health care facility would be covered under the Soo Line medical benefit plan for her daughter. She was advised that all persons making inquiries about "coverage" for a specified medical condition must also contact the employer (Soo Line) to verify that the employee or dependent was actually eligible for "coverage" under the specific terms and conditions of the applicable medical care plan. She was also advised that she would have to call Review Plus to make a determination of whether the health care was "medically appropriate" or medically necessary. Review Plus was the service provided to Soo Line by Health Risk Managament (HRM) to review possible hospitalizations of plan members.

The Petitioners, Mary and Harold Peterson, eventually signed an agreement for private placement of Heather with the Excelsior Youth Center, Inc. in Aurora, Colorado, and agreed to make payments to them.

Heather was placed in Excelsior in July of 1986 through 1987, and the Petersons were billed $26,257.32 for the cost of her treatment. Essentially, demand was made upon DCA to pay the medical bills under the Soo Line plan and the plan refused to pay the bills upon the grounds and for the reasons that it had been notified by the Soo Line that there was no coverage or benefits payable because Mr. Salo had been placed upon Medicare

benefits in 1980, and that the plan for Mr. Salo and his dependents legally terminated at that time even though benefits had mistakenly been paid for Heather Salo after that time. Excelsior brought an action against the Petersons and recovered judgment for the principal sum, interest, and costs for $33,856.20.

Thereafter, in 1989, Petitioners filed a complaint against Soo Line and DCA as the self-insurer and the administrator of the health care plan. The complaint was filed in Montana under various alternative state law theories including breach of contract, both express and implied, promissory estoppel, laches, and a breach of the implied covenant of good faith and fair dealing. Respondents removed the case to Federal District Court in Billings, Montana, asserting that the action came within the purview of the Employee Retirement Income Security Act (ERISA), and that Petitioners' claims were preempted under ERISA. At first the United States District Court refused to grant Soo Line and DCA's Motion to Dismiss and stated:

> "Whether Plaintiffs are able to factually establish the existence of an implied contract and breach thereof, without reference to or reliance upon the existence of the health care program, are issues which properly await resolution at a later stage of these proceedings."

Thereafter, after extensive discovery, Soo Line and DCA moved the Court for summary judgment and the United States District Court granted Soo Line and DCA summary judgment on May 8, 1991.

Essentially, the District Court found that ERISA preempts state remedies which either directly or indirectly relate to an employee benefit plan and found that the Petitioners Petersons were making reference to and relying upon a health and employee benefit plan. The District Court noted in its opinion in part as follows:

> "ERISA preempts state remedies which either directly or indirectly relate to an employee benefit plan,

see Dependahl v. Falstaff Brewing Corp., 653 F.2 1208, 1215 (8th Cir.), *cert. denied*, 454 U.S. 1084 (1981), so long as the relationship is not "too tenuous, remote or peripheral." *Shaw*, 463 U.S. at 100 n. 21. Preemption is appropriate where the state claims raised involve benefits relating to past employment. *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1505-06 (9th Cir. 1985). *See, also, Settles v. Golden Rule Life Ins. Co.*, 927 F.2d 505 (10th Cir. 1991). Only where the state claims have no such relationship will preemption be deemed inappropriate. *Sorosky v. Burroughs Corp.*, 826 F.2d 794, 800 (9th Cir. 1987).

Here, the record is replete with references to and reliance upon the plan at issue. The complaint itself states that defendants were contractually obligated to pay for the health care of Heather at Excelsior upon several theories to include:

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(Emphasis supplied).

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> The program at Milwaukee Road at the time Joe Salo became disabled was that he would con-

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Further, plaintiffs, in their brief, set forth the following:

> Certainly the existence of a medical plan and the course of conduct of the Defendants are part of the facts which establish reliance on and form a portion of the factual representations made to the Plaintiffs.

From these references to the health care plan, as well as the facts of the case presented by the parties, the Court can make no other finding that the plaintiffs relied on the benefit provisions of the plan as it related to the medical care received by Heather Salo. The finding is made notwithstanding any other alleged representation that plaintiffs may have relied upon in asserting their common law claims.

Having established that plaintiffs did indeed rely upon and relate to the health care plan at issue in asserting their claims, the Court's attention then turns to the legal effects of reliance on the claims asserted in regard to preemption. The Ninth Circuit has held that ERISA preempts various common law theories to include those of contract implied in fact, breach of contract, fraud, promissory estoppel, estoppel by conduct and deceit." (citing cases) * * *

(See Pet. Appendix B, pp. 11a and 12a)

The Ninth Circuit Court of Appeals affirmed the Federal District Court.

REASONS FOR DENYING THE WRIT

I. THE UNITED STATES DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS FOLLOWED THE PRECEDENTS ESTABLISHED BY THE UNITED STATES SUPREME COURT TO CORRECTLY RULE THAT PETITIONERS PETERSONS' STATE LAW CLAIMS WERE PREEMPTED BY ERISA.

In the leading case of *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987), the United States Supreme Court applied a "liberally expansive" interpretation to the statutory phrase "relate to" found in ERISA giving it its broad common sense meaning.

In that case, the U.S. Supreme Court held that ERISA preempts common law causes of action under state law which assert improper processing of claims under a benefit plan regulated by ERISA. In the *Pilot Life Insurance Co. v. Dedeaux*, *supra*, the U.S. Supreme Court noted that the preemption provision is "deliberately expansive," *Id.* 481 U.S. 41, 46, and further noted that the statutory phrase "relate[s] to" would be given its broadest common sense meaning. *Id.* 481 U.S. 47, 107 S.Ct. at 1553, quoting *Shaw v. Delta Air Lines*, 463 U.S. 85, 97-98, 103 S.Ct. 2890, 2900, 77 L.Ed.2d 490 (1983).

The Supreme Court went on to rule that a state law relates to a benefit plan "if it has a connection with or reference to such a plan". *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 739 (1985) quoting *Shaw*, 463 U.S. at 97. In *Pilot Life Insurance Co.*, 481 U.S. 41, the Court decided that ERISA preempted claims of tortious breach of contract, breach of fiduciary duties and fraud in the inducement arising from the improper processing of a claim.

The District Court here, in conformity with the rulings of the Supreme Court, recognized that the preemp-

tive provisions of ERISA "shall supersede any and all State laws insofar as they may now or hereinafter *relate to any employee benefit plan.*" Memo. and Order at 10a, citing 29 U.S.C. § 1144(a); C.R. 120 (See Pet. Appendix B). The Court followed the general rule that the preemptive provisions of ERISA must be broadly construed. *Id.* at 6. It noted that ERISA will preempt state law remedies when those remedies directly or indirectly "relate to" an employee benefit plan.

The United States Supreme Court has thereafter consistently held that state law claims which arise from or relate to the administration of ERISA governed plan are preempted. *See FMC Corp. v. Holliday*, 498 U.S. ——, 112 L.Ed.2d 356 (1990) and *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 112 L.Ed. 474 (1990).

FMC Corp., supra, involved a "self-funded" employee benefit plan like the health care plan involved in this case. The health care plan allowed an employer to seek subrogation for any amount it paid for medical expenses when a third-party claim was involved. The Pennsylvania state statute provided there was no right of subrogation from a claimant's tort recovery payable under any program, whether it was a group program or other type of insurance. The employer sought subrogation from Holliday's third-party recovery and Holliday objected stating that the state statute voided any subrogation clause. The United States Supreme Court held that ERISA preempted application of the Pennsylvania statute. *Id.* at 356-357. This Court went on to review of all of the numerous decisions which regarded the broad preemptive force of ERISA and held:

> "The preemption clause is conspicuous for its breadth. It establishes an area of exclusive federal concern the subject of every state law that 'relate[s] to' an employee benefit plan governed by ERISA."

Id. at 364.

The Court went on to state:

> "[ERISA] did not mean to preempt only state laws specifically designed to affect employee benefit plans. [T]o interpret the preemption clause to apply only to state laws dealing with the subject matters covered by ERISA, such as reporting, disclosure, and fiduciary duties, would be incompatible with the provisions legislative history because the House and Senate versions of the Bill that became ERISA contained limited preemption clauses, applicable only to state law relating to specific subjects covered by ERISA. *These were rejected in favor of the present language* in the *Act*, 'indicat[ing] that the sections preemptive scope was as broad as its language.'"

The Supreme Court emphasized again that the preemption under § 514(a) of ERISA must be interpreted expansively in the decision of *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 112 L.Ed. 474 (1990). In *Ingersoll* this Court held that ERISA preempted a claim that an employer wrongfully terminated an employee in order to avoid contributing to or paying benefits under an employee pension fund.

In the case of *Settles v. Golden Rule Ins. Co.*, 927 F.2d 505 (10th Cir. 1991), the Tenth Circuit Court was faced with a similar argument to the argument of the Petitioners in this case. In *Settles, supra*, the Plaintiff brought a suit alleging that Defendant Golden Rule Ins. Co.'s actions in terminating her husband's insurance coverage caused him to have a heart attack and die. Jurisdiction was based on diversity of citizenship, and the Plaintiff's cause of action alleged among other things, breach of contract, tort of outrage, fraudulent denial of insurance coverage, and wrongful death. The Federal District Court granted Defendant's motion to dismiss holding that ERISA preempted Plaintiff's claim. The Plaintiff argued that by making her wrongful death claim, she was not seeking benefits under a benefit plan which would be controlled or regulated by ERISA. The

Court in responding to that argument held in part as follows:

> "The present case is distinguishable from [*Clark v. Coats & Clark, Inc.*, 865 F.2d 1237 at 1243-44 (11th Cir. 1989)] and those other cases that held state law claims not preempted by ERISA because here the injury alleged was a direct result of the termination of plan benefits and cannot be characterized as "wholly remote" from the benefit plan. See, e.g., *Farlow v. Union Cent. Life Inc. Co.*, 874 F.2d 791, 794 (11th Cir. 1989) (distinguishing *Clark* because in *Farlow* the "alleged conduct is intertwined with the refusal to pay benefits").
>
> The factual basis for each of plaintiff's state law claims directly concerns the alleged improper administration of the benefit plan. Although plaintiff is not seeking benefits under the insurance policy, her claims require a finding that defendant wrongfully terminated Mr. Settles' insurance coverage. Therefore, the claims relate to the employee benefit plan. Plaintiff alleges in her complaint that:
>
> > "[a]s a direct result of the defendants' termination of insurance and breach of the insurance contract, decedent William L. Settles became severely emotionally distressed, suffered extreme mental anguish and was caused to suffer [a heart attack]."
>
> R.Doc. 1 at P 16; see also *id.* at pp. 32, 44, 53. We hold that, because plaintiff's claims "relate to" an employee benefit plan covered by ERISA, they are preempted by ERISA. See 29 U.S.C. § 1144(a) (§ 514(a) of ERISA)."

Petitioners argue on page 9 of their Petition that "any relation to ERISA plan maintained by Soo Line is *TOO TENUOUS, REMOTE OR PERIPHERAL* to find that the claims relate to the plan." The District Court and the Ninth Circuit Court of Appeals considered this argument and simply disagreed. The summary of

the findings by the District Court appears on pages 4, 5 and 6 of this Brief. Also in this case the Ninth Circuit Court, adhering to the Supreme Court's expansive view of ERISA preemption held:

> * * * "State law claims which "arise from the administration of [an ERISA governed] plan[] . . ." are preempted. *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1504 (9th Cir. 1985); *see also Greany v. Western Farm Bureau Life Ins. Co.*, 1992 U.S. App. LEXIS 20462 (9th Cir.). In determining whether a claim is preempted, it is necessary to decide whether "the conduct challenged . . . was part of the administration of an employee benefit plan" *Scott*, 754 F.2d at 1505.
>
> In *Greany*, the plaintiff had left the defendant's employ on July 31, 1983, believing his family was covered by the defendant's group health plan until August 31, 1983. In fact, the coverage terminated August 1, 1983. There was, however, at least one notice from the insurer to the plaintiffs stating that coverage terminated August 31, 1983. Unfortunately, the plaintiff's wife gave birth prematurely in the interim, to a baby that needed extensive medical care. When the insurer refused coverage, the plaintiff brought suit asserting several common law causes of action.
>
> In analyzing the case, we noted that despite attempts by the plaintiff to recharacterize the relationship between the parties, "[i]n reality, the Greanys challenge[d] the administration of ERISA plan benefits, . . ." *Greany v. Western Farm Bureau Life Ins. Co.*, 1992 U.S. App. LEXIS 20462. We said this was so because the employer's conduct "was merely a continuation of the duties it has as an employer in providing the group plan." *Id.* As a result, the state claims were preempted by ERISA.
>
> Similarly, in this case, the conduct challenged was part of the administration of an ERISA plan. DCA's representative's statements, which the Petersons claim to have relied on, were made, if at all, while admin-

istering Soo Line's employee benefit plan. Soo Line had hired DCA to administer its plan, and that is how the Petersons came into contact with DCA. Mary Peterson did not call DCA at random to request assistance with Heather's medical bills. She called it to ask about coverage because she thought that Heather was a beneficiary under Soo Line's plan. DCA's answers to Mary Peterson's inquiries, regardless of their substance, were thus provided in furtherance of its duty to administer the plan. As a result, as in *Greany*, any causes of action which arose from DCA's answers, as the Peterson's claims surely did, necessarily relate to the ERISA-governed plan and are therefore preempted by ERISA. * * *

* * * In the present case, the relation between the state law claims and the benefit plan is even closer. Here, the gravamen of the Petersons' state law claims is that they relied on DCA's statements and suffered damages as a result. Even if DCA made the statements alleged, the Petersons' cause of action requires the existence of a plan because it requires their reliance to have been reasonable. *See Trad Industries, Ltd. v. Brogan*, 246 Mont. 439, 446 (1991) (dicta); *Keil v. Glacier Park, Inc.*, 188 Mont. 455, 462 (1980) (dicta); *see also* Restatement of Contracts § 90 (1932). If the Petersons did not believe Heather was covered by the plan, no reliance on DCA's promises to pay for her health care could possibly have been reasonable. Consequently, as in *Ingersoll*, "the existence of a . . . plan is a critical factor in establishing liability under the State [claims]" and the state claims are thus preempted." (See Pet. Appendix A, pp. 3a, 4a and 5a)

II. THE PREEMPTION OF A PARTY'S COMMON LAW REMEDY BY VIRTUE OF ERISA IS NOT DEPENDENT ON THE EXISTENCE OF AN ERISA REMEDY.

On pages 8 and 9 of their Brief and in the Ninth Circuit, the Petersons argued that if they were denied their state law claims they would be left with no remedy, and

for that reason, their state law claims cannot be preempted.

The Ninth Circuit Court in this case correctly summarized the law in respect to the Petersons' argument when they noted as follows:

> "Despite the relationship discussed between the Petersons' state law claims and the Soo Line benefit plan, the Petersons argue that neither of them is either a participant in or a beneficiary of the Soo Line plan as defined by 29 U.S.C. § 1002 (7), (8) (1985). They contend that as a result, if they are denied their state law claims they will be left with no remedy. Thus they argue, their state law claims cannot be preempted.
>
> In the first instance, it may be that if benefits were due to Heather, she had a cause of action under ERISA. The Petersons' argument, however, must be rejected for an even more fundamental reason. As this court has previously held, "[t]here is simply no reason to assume that Congress intended ERISA's preemption reach to be coextensive with the Act's civil remedial scheme." *Olson v. General Dynamics Corp.*, 951 F.2d 1123 (9th Cir. 1991); *see also Porcaro v. The Colonial Life Insurance Co. of America*, 1991 U.S. Dist., LEXIS 15800 (W.D. Va.). Preemption of a party's common law remedy is not dependent on the existence of an ERISA remedy." (See Pet. Appendix A, p. 5a).

In *Olson v. General Dynamics Corp.*, 960 F.2d 1418 (9th Cir.), *certiorari denied* June 15, 1992 (112 S.Ct. 296), the Plaintiff brought a fraud claim alleging that the level of retirement benefits by an employer was misrepresented to him. The District Court had held that the misrepresentations "related to" an employee benefit plan and were thus preempted by ERISA. Olson made a creative argument that ERISA would not prohibit the wrong that Olson felt because to do so would leave a "gap" in the law. The Ninth Circuit noted:

"The policy choices reflected in the inclusion of certain remedies and the exclusion *1423 of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. 481 U.S. at 54, 107 S.Ct. at 1556. There is simply no reason to assume that Congress intended ERISA's preemptive reach to be coextensive with the Act's civil remedial scheme. The Eleventh Circuit has addressed this precise question in a case closely analogous to the present one:

> The employees protest that to hold that ERISA preempts this fraud claim, while also holding that ERISA does not prohibit the wrong the employees feel they have suffered, leaves a "gap" in the law. That is exactly the result that obtains when Congress determines that federal law should govern a broad area to the exclusion of state regulation and chooses not to prohibit the actions formerly prohibited by state law. It is the very conflict between the federal scheme and state law that is to be avoided through preemption. To argue that Congress has created a "gap" in the law does not undermine the reasoning on which a finding of preemption is based. *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1470 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016, 107 S.Ct. 1893, 95 L.Ed.2d 500 (1987).

We agree with the Eleventh Circuit that any such gap is the concern of Congress, and so we affirm the district court's ruling that Olson's fraud claim "relates to" an employee benefit plan, and is therefore preempted by ERISA."

The decisions of the District Court and the Ninth Circuit Court of Appeals in this case correctly held that the state law claims alleged by the Petitioners arise from or relate to the Administration of an ERISA governed plan and are therefore preempted.

CONCLUSION

The Petitioner's claims in this case were preempted by ERISA. The expansive sweep of the preemption effect of ERISA as intended by Congress and as interpreted and upheld by the United States Supreme Court mandates that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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February 23, 1993

No. 92-1352

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

HAROLD A. PETERSON; MARY J. PETERSON,
Petitioners,

v.

SOO LINE RAILROAD COMPANY;
DCA HEALTHCARE MANAGEMENT GROUP, INC.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

RESPONDENT SOO LINE RAILROAD COMPANY'S BRIEF IN OPPOSITION

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I.

QUESTION PRESENTED FOR REVIEW

The Restated Question For Review Is:

Whether ERISA preempted Petitioners' state law tort claims which arose from their attempts to obtain medical benefits for their dependent child from a self funded employee benefit plan governed by ERISA when Petitioners were not plan participants or beneficiaries.

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PARENT AND/OR SUBSIDIARY COMPANIES

Pursuant to Sup. Ct. Rule 29.1, Soo Line identifies its parent and/or subsidiary companies as follows:

Parent Companies

(1) Soo Line Corporation

(2) Canadian Pacific (U.S.) Holding, Inc.

(3) Canadian Pacific Management Inc.

(4) Canadian Pacific Limited

Subsidiaries (except wholly-owned subsidiaries) include:

(1) Chicago, Terre Haute and Southeastern Railway Company

IN THE
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENT SOO LINE RAILROAD COMPANY'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Ninth Circuit Court of Appeals stated that disposition of the case was not appropriate for publication and it has not been published.

JURISDICTION

1. The Judgment in the Ninth Circuit Court of Appeals was entered on 15 October, 1992.

2. The Supreme Court has jurisdiction to consider a Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

II.

STATEMENT OF THE CASE

Soo Line Railroad Company (hereafter Soo Line) supplements Petitioners' (Petersons) Statement of the Case as follows:

Petersons original Complaint against Soo Line and DCA Healthcare Management, Inc. (hereafter DCA) asserted that Soo Line and DCA were "contractually obligated to pay for the health care of Heather Salo at Excelsior in Colorado . . . ." They claimed that "there was an express health care contract which provided for benefits for Mary Heather Salo." Petersons further alleged that "[t]he contract for the health care of Mary Heather Salo [was] established by past consideration related to the employment of Joseph V. Salo by The Milwaukee Railroad."

Because Joseph Salo was employed by The Milwaukee Railroad at the time of his disability, he and his dependents were eligible for certain benefits. Those benefits included health care coverage under a "self-funded" medical plan sponsored by The Milwaukee Railroad. As a management employee, Mr. Salo and his dependents were covered by The Milwaukee Railroad AND SUBSIDIARY COMPANY'S MEDICAL CARE PLAN (for executives, officers, and exempt employees). The Milwaukee Railroad plan was "self-funded", i.e., it was not an insurance policy because all benefits were paid directly by the employer.

The TERMINATION OF COVERAGE provision of The Milwaukee Railroad Medical Plan, § 14.0, provided inter alia: "All coverage for you and your dependents will cease upon termination of employ-

ment. In addition, medical care coverages under the plan will be discontinued on the day before a covered person becomes eligible for Medicare." Joseph Salo became eligible for Medicare in approximately March of 1980.

The Milwaukee Railroad filed for bankruptcy protection in 1977. SLRCO, a subsidiary of Soo Line Corporation, acquired certain assets of The Milwaukee Railroad and assumed certain obligations for some of its railroad employees. Some former employees of The Milwaukee Railroad became eligible for benefits under the Soo Line medical benefit plan following the February 19, 1985 acquisition of certain assets by SLRCO (this entity later changed its name to The Milwaukee Road, Inc.). The Milwaukee Road, Inc. was merged with Soo Line Railroad Company on December 31, 1985.

Joseph Salo was incorrectly identified as a person who was eligible for benefits under the Soo Line Medical Benefit Plan following the Milwaukee/Soo Line acquisition. Because of this error, medical claims submitted by dependents of Joseph Salo to Soo Line were incorrectly paid. By June 26, 1986, it was determined that the dependents of Joseph Salo were incorrectly receiving health care benefits from Soo Line.

On April 22, 1986, Heather Salo, a dependent of Joseph Salo and Mary (Salo) Peterson was admitted to Deaconess Medical Center in Billings, Montana for treatment of emotional/mental problems. Heather remained in Deaconess Hospital until July 20, 1986. Heather Salo was then admitted to Excelsior Youth Care Center in Colorado on July 21, 1986. Petersons signed two (2) written con-

tracts: 1) AGREEMENT FOR PRIVATE PLACEMENT, and 2) ENROLLMENT AGREEMENT. Neither Soo Line or DCA, the plan supervisor for the Soo Line self-funded employee medical benefit plan, were signatories to these contracts.

On approximately June 27, 1986, the benefits administrator for Soo Line reviewed the claims being made for Heather Salo's mental health care. Based on this review and subsequent investigation, it was determined that coverage should have terminated prior to this date. Termination notice was then communicated to a claims examiner for DCA.

Mary Peterson was notified that dependent coverage under Mr. Salo's medical plan was terminated when she received a form from DCA after submitting a claim for one of her other children. She contacted DCA who in turn referred

her to the benefits administrator for Soo Line. She was told that coverage should have been cancelled when Joseph Salo became eligible for Medicare but apparently, the Medicare issue had been overlooked and dependent benefits were continued. Although Soo Line determined that benefits were terminated after June 27, 1986, it paid for Heather Salo's entire hospitalization at the Billings Deaconess facility through July 20, 1986. It made no attempt to seek reimbursement for health care benefits that were improperly paid to the dependents for over six (6) years.

In response to the denial of benefits, Mary Peterson retained an attorney in August of 1987 "with respect to the medical group coverage for her family, which was issued under her previous husband, Joseph V. Salo." Petersons' attor-

ney claimed that there was a letter from The Milwaukee Railroad assuring Mary Peterson that there would be "complete coverage" for the dependents of Joseph Salo. He demanded that "Soo Line immediately pay all outstanding bills from Excelsior, and continue medical coverage as promised until the youngest Salo child [was] eighteen (18)."

In response to the demand, Soo Line advised Petersons' attorney of the information necessary for a "formal review", as provided by ERISA under Mr. Salo's health care plan. Petersons failed to provide the requested information to Soo Line. They continued to demand that the dependents were entitled to coverage under the health care program of The Milwaukee Railroad as it existed at the time Joseph Salo became disabled.

Soo Line officially denied Petersons' claim for health care benefits because it was contrary to the specific terms and conditions of the ERISA governed medical plan. Petersons were advised, "as provided under ERISA", that the medical plan had a formal review procedure if they disagreed with the decision. A copy of the ERISA mandated procedure was provided to the Petersons. Rather than following the formal review process, Petersons filed a lawsuit seeking relief, not under ERISA, but under state law theories of liability.

III.

SUMMARY OF ARGUMENT

Petersons' Petition should be rejected because no issue of significant and important federal law has been raised. The application of preemption

to state law tort claims, like the Petersons', referencing, relating to and dependent upon the existence of an ERISA governed employee benefit plan, has been settled by this Court. The Constitutional issues first identified by the Petersons in this Petition come too late for consideration by this Court.

Regardless of how Petersons characterize their claims today, the factual record relied upon by the Ninth Circuit Court of Appeals shows that their state law based claims had no independent existence, apart from the ERISA governed health care plan at issue in this case. Because Petersons' claims could not survive without reference to and reliance upon the ERISA plan, preemption was properly applied by the Ninth Circuit court.

Petersons' status as non-participants or non-beneficiaries under the

plan is irrelevant to the proper application of preemption. Petersons' seek to be reimbursed for the costs and expenses associated with the mental health care provided to Mary Peterson's minor daughter, Heather. They are, in effect, acting in a representative capacity for Heather, asserting a right to plan benefits. The resolution of entitlement to plan benefits ultimately turns on the interpretation, application, and administration of the ERISA governed plan, not on the status of the Petersons as plan participants or beneficiaries.

More importantly, they seek tort, extra contractual, and punitive damages. These are not recognized forms of relief under the remedial provisions of ERISA. They are asking to be treated more favorably as nonparticipants or non-beneficiaries of the ERISA plan than

a participant or beneficiary, when the basis of the claims would be the same, i.e., the ERISA governed health care plan.

Petersons have not been denied a remedy. Their real complaint is that they did not like the remedy that was available to them. They voluntarily chose to forego the ERISA mandated review process in the hopes that they could escape the preemptive force of ERISA. They took a calculated risk when they pursued state law theories of liability rather than following ERISA procedures. They should not now be heard to complain because they are barred by preemption, the very risk they knew they faced when they sought alternative relief, outside the statutory framework of ERISA.

Petersons' Petition is another attempt by them to avoid ERISA preemption. It raises the same arguments that have been considered and rejected by the federal district court and the Ninth Circuit. They are entitled to no greater relief than a plan participant or beneficiary who relies upon and references an ERISA governed plan in making a claim, just as the Petersons are doing here. Under the facts of this case, in combination with the controlling law, preemption was properly applied.

IV.

ARGUMENT

A. NO IMPORTANT AND UNSETTLED QUESTION OF FEDERAL LAW IS PRESENTED BY PETERSONS PETITION FOR WRIT OF CERTIORARI

Petersons' Petition should be denied because the Ninth Circuit Court of

Appeals correctly applied the established body of interpretive law relating to the preemptive force of ERISA to the state law based common law claims at issue here. This Petition presents no special or important reasons sufficient to move this Court's discretion to review the issues presented by Petersons. The appellate court's decision does not present an unsettled question of law requiring resolution by this Court, nor does it present a decision on a federal question that conflicts with the applicable decisions of this Court.

The preemptive ambit of ERISA is a "settled" question of federal law. The issue raised by the Petersons' is not an undecided "important" federal question. To the contrary, ERISA preemption has been reviewed and reaffirmed on numerous occasions by this Court. Thus, the dis-

cretionary power of this Court should not be exercised to grant Petersons' Petition. Sup. Ct. R. 10.1(c).

1. Petersons Failed To Timely Raise Constitutional Claims

The Petition should also be denied because it raises issues not considered below. Petersons now want to assert Constitutionally based claims of due process and equal protection. However, in all of the proceedings below, there was no mention or reference to a Constitutional claim. The failure to raise these issues in the district court or the appellate court was a failure to preserve the issues for review and a waiver of their applicability to the issues before this Court. See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 n.13 (1976); Tennessee v. Dunlap, 426 U.S. 312, 314 n.2 (1976).

B. PETERSONS' STATE LAW BASED TORT CLAIMS ARE DEPENDENT UPON THE ERISA GOVERNED HEALTH CARE PLAN AND ARE THEREFORE PREEMPTED

This Court has consistently applied a "liberally expansive", broad common sense interpretation to the statutory phrase "relate to" found in ERISA. See Pilot Life Insurance Co. v. Deadeaux, 481 U.S. 41, 46-47 (1987); Shaw v. Delta Airlines, 473 U.S. 85, 97-98 (1983); Ingersoll-Rand Co. v. McClendon, 498 U.S. ___, 112 L. Ed. 2d 474, 483 (1990). Accordingly, this Court has ruled that a state law relates to a benefit plan "if it has a connection with or reference to such a plan." Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 739 (1985), quoting Shaw, 463 U.S. at 97. The Ninth Circuit Court of Appeals in deciding the case below was guided by the teachings of this Court. "In deter-

mining whether a claim is preempted, it is necessary to decide whether 'the conduct challenged' . . . was part of the administration of an emplovee benefit plan." Peterson v. Soo Line Railroad, No. 91-35659 (9th Cir. Oct. 15, 1992) at 3, citing Scott v. Gulf Oil Corp., 754 F.2d 1499, 1505 (9th Cir. 1985). The court identified the appellate issue as "whether the Petersons' state law claims 'relate to' Soo Line Railroad Company's ('Soo Line') employee health care plan." Id. In reaching its decision, the appellate court concluded that the conduct challenged by the Petersons was, in fact, part of the administration of an ERISA governed plan. Id. at 4.

Petersons have mischaracterized Soo Line's position regarding the existence of a health care plan after 1980. Soo line has not argued "[t]here was no

plan", as represented by the Petersons. Petition at 4,9. To the contrary, it has been Soo Line's position that when Mr. Salo became eligible for Medicare benefits, based on the specific terms and conditions of the applicable health care plan, coverage for his dependents should have terminated. However, because of an administrative oversight which probably occurred during the complicated process of Soo Line acquiring certain assets and obligations of the bankrupt Milwaukee Railroad, his dependents continued to receive health care coverage until June of 1986. In other words, the dependent children received a significant monetary benefit at the expense of Soo Line's administrative error. But Soo Line has never sought a refund or reimbursement for the improperly paid health care benefits.

The issue before this Court, though, is whether the Petersons have an unlimited right to continue to benefit because of that mistake? Not only do the Petersons want all of the medical benefits allegedly due under the health care plan, they demand the right to go outside the plan to seek tort and punitive damages. Because these issues cannot be resolved without reference to and reliance upon the ERISA governed employee benefit plan, preemption must necessarily apply.

2. The Factual Record Documents Petersons Reference To And Reliance Upon The ERISA Governed Plan

The Ninth Circuit court carefully analyzed the factual record. It cited to substantial evidence showing that whatever information was provided to the Petersons by DCA or Soo Line, regardless of its substantive character, that infor-

mation related to coverage under an ERISA governed health care plan. Id. at 4. Consequently, "any causes of action which arise from DCA's answers, as the Petersons' claims surely did, necessarily relate to the ERISA governed plan and [were] therefore, preempted by ERISA." Id.

The appellate court critically analyzed the "gravamen of the Petersons' state law claims." It noted the relationship between the state law claims and the health care benefit plan. Id. Petersons' reliance on the alleged statements of DCA was the basis for their state law claims. Therefore, "[e]ven if DCA made the statements alleged, the Petersons' cause of action requires the existence of a plan because it requires their reliance to have been reasonable." Id. Citing this Court's deci-

sion in Ingersoll-Rand Co. v. McClendon, ___ U.S. ___, 111 S. Ct. 478 (1990), the appellate court stated "the existence of a . . . plan is a critical factor in establishing liability under the state [claims] and the state claims are thus preempted." Id. at 5.

3. Petersons' Purposely Rejected Their ERISA Remedies

The Ninth Circuit court also considered but likewise rejected Petersons' claims that they "cannot be left without a remedy." Petition at 9. They were not "without a remedy", they were simply unsatisfied with the remedy they may have been entitled to pursue. Petersons' seek to avoid the preemptive force of ERISA by trying to characterize their claims as something other than claims for benefits under an ERISA governed plan. But as the Ninth Circuit court

ruled: "We understand this argument, but we reject it." Peterson, at 3.

The factual background of this case is replete with references to the ERISA governed plan by the Petersons; with reliance on the terms and conditions of the ERISA governed plan by the Petersons; with a clear understanding by the Petersons of the relationship between the ERISA governed plan and the benefits claimed. The Ninth Circuit court properly pointed out that "if benefits were due to Heather, she had a cause of action under ERISA." Peterson at 5. This case should be about a claim for medical benefits for the Petersons' dependent child Heather, utilizing the remedial provisions of ERISA. Instead, Petersons are attempting to preserve some kind of independent state law based tort

claim, including the imposition of punitive damages, for themselves.

Moreover, Petersons' were advised of their potential remedies and the procedure they must follow to avail themselves of those remedies. It must be assumed that they took a calculated, conscious, and deliberate risk to forego the ERISA mandated process with the expectation that they would have the right to pursue relief outside the preemptive ambit of ERISA. They gambled and they lost. This is not a case where there was no remedy, this is a case where the remedy was not pursued.

The appellate court in the decision below observed that the status of the Petersons, whether they were plan participants or beneficiaries, was not the determinative issue in deciding if their state law based claims could survive

ERISA preemption. Rather, and even more fundamentally, the Ninth Circuit court looked to this Court for guidance: "There is simply no reason to assume that Congress intended ERISA's preemption reach to be coextensive with the Act's civil remedial scheme" Id. at 5 citing Olson v. General Dynamics Corp., 591 F.2d 1123 (9th Cir. 1991). Ultimately, as the appellate court correctly observed, "[p]reemption of a party's common law remedy is not dependent on the existence of an ERISA remedy." Peterson at 5.

Thus, there is no basis in law or in fact for the Petersons to ask this Court to overrule its settled, long-standing precedent of applying ERISA preemption to state law based common law tort claims which relate to, reference, and rely on the administration of an

ERISA governed employee benefit plan, like the plan involved in this case.

V.

CONCLUSION

Petersons have failed to present sufficient justification for this Court to accept their Petition. The law relating to ERISA preemption of state law based tort claims, like the Petersons, is settled. Their Petition should be denied.

Respectfully submitted,

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March 9, 1993

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HAROLD A. PETERSON; MARY J. PETERSON,	)	No. 91-35659
Plaintiffs-Appellants,	)	D.C. No. CV-89-00112-RW
vs.	)	
SOO LINE RAILROAD COMPANY; DCA HEALTH CARE MANAGEMENT GROUP INC.,	)	
Defendants-Appellees.	)	

Appeal from the
United States District Court
for the District of Montana
Richard W. Anderson,
Magistrate Judge, Presiding

Argued and Submitted October 9, 1992
San Francisco, California

Before: BROWNING, THOMPSON and KLEINFELD,
Circuit Judges

OVERVIEW

In this diversity action, Harold A. Peterson and Mary J. Peterson ("the Petersons") appeal the district court's summary judgment holding that their state law claims were preempted by the Employee Retirement Income Security act, 29 U.S.C. § 1001 et seq. (1985) ("ERISA"). The Petersons further contend that they were improperly denied an opportunity to amend their complaint to add additional state law claims. We have jurisdiction under 28 U.S.C. § 1291 (1966), and we affirm.

DISCUSSION

Summary judgment is "appropriate only when no genuine issue of material fact exists and the moving party is clearly entitled to prevail as a matter of law." Green v. Los Angeles County

Superintendent of Schools, 883 F.2d 1472, 1475 (9th Cir. 1989). Within the context of this case, if ERISA preempts the Petersons' state law claims, then the defendants are entitled to summary judgment.

"'[T]he question whether a certain state action is preempted by federal law is one of congressional intent.'" Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45 (1987) (quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985). ERISA's preemption provision is "deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.'" Pilot Life, 481 U.S. at 46 (citation omitted). Moreover, it has recently been described by the Supreme Court as "conspicuous for its breadth." FMC Corp. v. Holliday, 498 U.S. ___, ___,

111 S. Ct. 403, 407 (1990). It provides for federal preemption of "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) . . . ." 29 U.S.C. § 1144(a) (1985) (emphasis added). The question on which this appeal turns, then, is whether the Petersons' state law claims "relate to" Soo Line Railroad Company's ("Soo Line") employee health care plan.

The Petersons argue that they are claiming damages which they suffered because they relied on statements made by representatives of DCA Health Care Management Group ("DCA"), rather than benefits due under Soo Line's employee benefit plan. As a consequence, they contend their claim does not relate to Soo Line's plan and is not preempted by ERISA. We understand this argument, but

we reject it.

State law claims which "arise from the administration of [an ERISA governed] plan[] . . ." are preempted. Scott v. Gulf Oil Corp., 754 F.2d 1499, 1504 (9th Cir. 1985); see also Greany v. Western Farm Bureau Life Ins. Co., 1992 U.S. App. LEXIS 20462 (9th Cir.). In determining whether a claim is preempted, it si necessary to decide whether "the conduct challenged . . . was part of the administration of an employee benefit plan." Scott, 754 F.2d at 1505.

In Greany, the plaintiff had left he defendant's employ on July 31, 1983, believing his family was covered by the defendant's group health plan until August 31, 1983. In fact, the coverage terminated August 1, 1983. There was, however, at least one notice from the

insurer to the plaintiffs stating that coverage terminated August 31, 1983. Unfortunately, the plaintiff's wife gave birth prematurely in the interim, to a baby that needed extensive medical care. When the insurer refused coverage, the plaintiff brought suit asserting several common law causes of action.

In analyzing the case, we noted that despite attempts by the plaintiff to recharacterize the relationship between the parties, "[i]n reality, the Greanys challenge[d] the administration of ERISA plan benefits , . . ." Greany v. Western Farm Bureau Life Ins. Co., 1992 U.S. App. LEXIS 20462. We said this was so because the employer's conduct "was merely a continuation of the duties it has as an employer in providing the group plan." Id. As a

result, the state claims were preempted by ERISA.

Similarly, in this case, the conduct challenged was part of the administration of an ERISA plan. DCA's representative's statements, which the Petersons claim to have relied on, were made, if at all, while administering Soo Line's employee benefit plan. Soo Line had hired DCA to administer its plan, and that is how the Petersons came into contact with DCA. Mary Peterson did not call DCA at random to request assistance with Heather's medical bills. She called it to ask about coverage because she thought that Heather was a beneficiary under Soo Line's plan. DCA's answers to Mary Petersons's inquiries, regardless of their substance, were thus provided in furtherance of its duty to administer

the plan. As a result, as in Greany, any causes of action which arose from DCA's answers, as the Petersons' claims surely did, necessarily relate to the ERISA-governed plan and are therefore preempted by ERISA.

Moreover, where the existence of an ERISA-governed plan is a "critical factor" in establishing a state law claim, ERISA preempts it. Ingersoll-Rand Co. v. McClendon, ___ U.S. ___, ___, 111 S. Ct. 478, 483 (1990). In Ingersoll, the plaintiffs had filed a state law wrongful discharge claim alleging that their employer fired them to avoid paying benefits which would otherwise have become due. The Court held that, as the benefit plan's existence was a critical factor in their claim, the claim related to the plan and ERISA preempted it.

In the present case, the relation between the state law claims and the benefit plan is even closer. Here, the gravamen of the Petersons' state law claims is that they relied on DCA's statements and suffered damages as a result. Event if DCA made the statements alleged, the Petersons' cause of action requires the existence of a plan because it requires their reliance to have been reasonable. See Trad Industries, Ltd. v. Brogan, 246 Mont. 439, 446 (1991) (dicta); Keil v. Glacier Park, Inc., 188 Mont. 455, 462 (1980) (dicta); see also Restatement of Contracts § 90 (1932). If the Petersons did not believe Heather was covered by the plan, no reliance on DCA's promises to pay for her health care could possibly have been reasonable. Consequently, as in Ingersoll, "the

existence of a . . . plan is a critical factor in establishing liability under the State (claims)" and the state claims are thus preempted.

Despite the relationship discussed between the Petersons' state law claims and the Soo Line benefit plan, the Petersons argue that neither of them is either a participant in or a beneficiary of the Soo Line plan as defined by 29 U.S.C. § 1002 (7), (8) (1985). The contend that as a result, if they are denied their state law claims they will be left with no remedy. Thus, they argue, their state law claims cannot be preempted.

In the first instance, it may be that if benefits were due to Heather, she had a cause of action under ERISA. The Petersons' argument, however, must be rejected for an even more fundamental

reason. As this court has previously held, "[t]here is simply no reason to assume that Congress has previously held, "[t]here is simply no reason to assume that Congress intended ERISA's preemption reach to be coextensive with the Act's civil remedial scheme." Olson v. General Dynamics Corp., 951 F.2d 1123 (9th Cir. 1991); see also Porcaro v. The Colonial Life Insurance Co. of America, 1991 U.S. Dist. LEXIS 15800 (W.D. Va.). Preemption of a party's common law remedy is not dependent on the existence of an ERISA remedy.

Finally, the Petersons contend they should have been allowed to amend their complaint and that the district court improperly denied their motion to do so. We disagree. Based on the foregoing analysis, any additional state law claims for benefits which were

denied under the plan, or for damages because the benefits were denied, would be preempted by ERISA. As a result, the Petersons' proposed amendment would be futile. Futility being a proper ground for refusing to allow an amendment, Hurry Up Retirement Fund Trust, 648 F.2d 1252 (9th Cir. 1981), the district court's denial of the motion to amend was proper.

AFFIRMED: